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Utah Supreme Court Briefs

2001

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation v. FRANK H. FULLMER, DAVID H. FULLMER and WILLARD L. FULLMER, JR., individually, and as co-partners doing business under the name and style of FULLMER BROS., a co-partnership; WILLIAM L. PEREIRA doing business as WILLIAM L. PEREIRA & ASSOCIATES ; WILLIAM L. PEREIRA & ASSOCIATES, a corporation, and ALLEN STEEL COMPANY, a corporation: Answer and Reply Brief of Plaintiff and Appellant

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Utah Supreme Court

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Recommended Citation

Reply Brief, *PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation v. FRANK H. FULLMER, DAVID H. FULLMER and WILLARD L. FULLMER, JR., individually, and as co-partners doing business under the name and style of FULLMER BROS., a co-partnership; WILLIAM L. PEREIRA doing business as WILLIAM L. PEREIRA & ASSOCIATES ; WILLIAM L. PEREIRA & ASSOCIATES, a corporation; and ALLEN STEEL COMPANY, a corporation*, No. 10258.00 (Utah Supreme Court, 2001).
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UTAH SUPREME COURT
IMENT
BRIEF
KET NO. 10258A
RT

STATE OF UTAH

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation
Plaintiff and Appellant,
vs.
FRANK H. FULLMER, DAVID H. FULLMER and WILLARD L. FULLMER, JR., individually, and as co-partners doing business under the name and style of FULLMER BROS., a co-partnership; WILLIAM L. PEREIRA doing business as WILLIAM L. PEREIRA & ASSOCIATES; WILLIAM L. PEREIRA & ASSOCIATES, a corporation; and ALLEN STEEL COMPANY, a corporation,
Defendants and Respondents.

Case No. 10258

ANSWER AND REPLY BRIEF OF PLAINTIFF AND APPELLANT

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IN THE SUPREME COURT
of the
STATE OF UTAH

PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation

Plaintiff and Appellant,

vs.

FRANK H. FULLMER, DAVID H. FULLMER and WILLARD L. FULLMER, JR., individually, and as co-partners doing business under the name and style of FULLMER BROS., a co-partnership; WILLIAM L. PEREIRA doing business as WILLIAM L. PEREIRA & ASSOCIATES; WILLIAM L. PEREIRA & ASSOCIATES, a corporation; and ALLEN STEEL COMPANY, a corporation,

Defendants and Respondents.

Case No. 10258

ANSWER AND REPLY BRIEF OF PLAINTIFF AND APPELLANT

All matters preliminary to the Argument have been adequately discussed in the opening briefs submitted herein. While Appellant Prudential (hereinafter referred to as Appellant) takes issue with certain matters set forth by Respondent Pereira (hereinafter referred to as Respondent) in its Statement of Facts, for the sake of simplicity Appellant will discuss these matters in relation to the particular points of law to which these matters pertain.

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APPELLANTS ANSWER TO RESPONDENT'S CROSS APPEAL

ARGUMENT

POINT I

UNDER UTAH LAW, THE ACTIVITIES OF RESPONDENT CLEARLY CONSTITUTED DOING BUSINESS IN UTAH.

A. JURISDICTIONAL FACTS

The following facts of record in this case are clearly sufficient to sustain the trial court's finding that Respondent was at all times material hereto doing business in the State of Utah:

1) As the Architect Agreement between Appellant and Respondent discloses, Respondent undertook and agreed to perform extensive architectural, engineering and supervision services in connection with the design and construction of the five-story Prudential Federal Savings & Loan Association Building in Salt Lake City. (Ex. A, R. 77 et seq.) Among other things, this Agreement required Respondent's full-time supervision during the construction period, and Respondent expressly contracted to furnish the services of a qualified superintendent to reside in Salt Lake City during the entire construction period. (Ex. A, R. 78, para. 5(c)).

2) The building project in the instant case was commenced early in the year 1962 (Complaint, R. 16, para. III), at which time Respondent sent Mr. James S. Manning to Salt Lake City to perform the supervisory services above mentioned.

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(Pereira affidavit, R. 123, para. 9; Manning affidavit, R. 31, para. 6).

3) Mr. Manning opened an office in Salt Lake City, and the name "Wm. L. Pereira & Associates" was listed on the first floor directory of the building. (Kershisnik affidavit, R. 104, para. 2).

4) Mr. Manning engaged a secretary and instructed her to answer the phone "William L. Pereira & Associates." Moreover, Mr. Manning obtained a listing in the Salt Lake City telephone directory, in both the regular and yellow classified sections, for William L. Pereira & Associates, listing a Salt Lake City address. Significantly, this listing also appears in the most recent Salt Lake City Directory, published in June, 1964. (Kershisnik affidavit, R. 104, para. 2).

5) Respondent on its letterhead stationery designated Mr. Manning as "Resident Architect, 125 South Main Street, Salt Lake City, Utah." (Kershisnik affidavit, R. 104, para. 2).

6) In 1964, Mr. Manning opened a checking account in the Beehive State Bank in Salt Lake City in the name of William L. Pereira & Associates. (Kershisnik affidavit, R. 104, para. 2).

7) During the period from 1962 through 1964, Respondent engaged in extensive business operations other than Appellant's project, including design and supervision of a building for Brigham Young University at Provo, Utah, involving gross construction costs of approximately six million dol-

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lars ($6,000,000). (Kershisnik affidavit, R. 104, para. 3; Donovan affidavit, R. 100, para. 11).

8) Respondent directed Mr. Manning to "drum up" additional architectural business for Respondent in Salt Lake City, and Mr. Manning in fact actively solicited such business throughout the period from 1962 to 1964. (Kershisnik affidavit R. 104-105, para. 3).

9) Respondent prepared certain schematic and preliminary plans and drawings in connection with a proposed residence in Salt Lake City for Mr. Gene Donovan, Appellant's President, for which services Respondent was paid fees in the approximate amount of $1,300.00. (Pereira affidavit, R. 122, para. 4).

10) William L. Pereira has individually held a license to practice architecture in the State of Utah since 1954. (Staten affidavit, R. 116, para. 11).

11) Respondent performed full time architectural services in Salt Lake City with respect to Appellant's project as late as June 11, 1964. (Manning affidavit, R. 149, paras. 4-5).

12) Respondent on July 21, 1964, submitted its statement showing fees which it claimed were owing from Appellant on its project in the total amount of $255,573.15 as of that date. (R. 163).

B. APPLICABLE LAW

Respondent argues that under Utah law, architectural services performed over a period of two

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years and involving the construction of two multi-million dollar buildings in Utah constituted mere "isolated transactions," not constituting a continuing activity with in the State. (Respondent's Brief pp. 15-16). First of all, it is significant that the Utah Legislature in defining the requirements whereby a foreign corporation must qualify to do business in the State, exempted such corporations from the registration requirements of Utah law, if only a few isolated transactions were involved and were completed within a *thirty day period.* (Section 16-10-102 (j) UCA 1953 the Utah Business Corporation Act) Obviously, the Legislature never intended that continuous and extensive activities occurring over a two year period could be considered as "isolated transactions."

Moreover, the cases which Respondent cites in support of its position are clearly inapplicable. The case of *Marchant, et al., v. National Reserve Company of America, et al.*, 103 Utah 530, 137 P.2d 331, cited by Respondent at page 13 of its Brief held that where the sole corporate activity in Utah over a four year period was the execution of four deeds for the conveyance of land, the corporation could not be held to be doing business in Utah. The *Conn v. Whitmore* case, 9 U.2d 250, 342 P.2d 871 (1959), cited at page 14 of Respondent's brief, involved the single sale of two horses and is obviously an isolated transaction. The *East Coast Discount Corporation v. Reynolds* case, 7 U.2d 362, 325 P.2d 853 concerned the question whether *plaintiff* should have qualified to do business in Utah, to entitle it to bring

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suit in Utah courts; consequently, this case is not helpful in determining the proper limits of jurisdiction over non-resident *defendant* corporations. Finally, the *Western Gas Appliances v. Servel, Inc.* case, 123 Utah 229, 257 P.2d 950, cited by Respondent at page 14 of its Brief is easily distinguishable, for it involved a foreign corporation which had no office, telephone, property or employee in Utah, and which neither solicited or made any direct sales of goods in Utah, except to wholesale distributors.

The following Utah cases fully support the lower court's finding herein. *Industrial Comm. v. Kemmerer Coal Co.*, 106 Utah 476, 150 P.2d 373 (1944) held that defendant nonresident corporation was doing business in Utah within the meaning of Section 104-5-11, Utah Code Annotated 1943, which section was identical to present Utah Rule 4(e)(4). It based its finding upon facts strikingly similar to those involved in that instant case:

> "In the instant case the defendant maintains an office in this state at its own expense for the convenience of its resident agents who solicit business for it here and also that these agents may be in a position to furnish it reports of any business opportunities which might become available here. Its name is listed in the telephone directory, the building directory in which it maintains this office and also on the door of the office. It makes a regular and continuous attempt to solicit sales of its coal to consumers in Utah through these employees." (150 P.2d at pp. 374-375).

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In *McGriff v. Charles Antell, Inc. et al.*, 123 Utah 166, 256 P.2d 703 (1953), Justice Henriod made the following important observation directly applicable to our situation:

> "To date the pattern, which in a changing world is ever changing, excludes solicitation alone as justifying jurisdiction conferred. Beyond such solicitation the activity to confer jurisdiction must be of sufficient substance and of such scope and variety as would lead a court of last resort to conclude that *immunization of the foreign corporation against the power of our forum would be unrealistic, unreasonable and a vehicle for oppressing or meting out injustice to our own local citizens.*" (256 P.2d at p. 705, emphasis added).

Similarly, in the instant case, it is at once apparent that immunization of a foreign corporation engaged in and responsible for the design and on-site supervision of multi-million dollar public and private building projects within this State clearly would be unrealistic and unreasonable, for in Respondent's business, the potential risks of harm to persons and property in Utah is far greater than in the typical sales situation involved in the cases upon which Respondent so heavily relies.

In *Dykes v. Reliable Furniture & Carpet*, 3 U.2d 34, 277 P.2d 969 (1954), Justice Henriod reaffirmed this Court's position that mere solicitation of sales would be insufficient to constitute doing business, and stated that the requisite "something else" in addition to solicitation should be:

> "such as would inspire in a reasonable person's mind the conviction that such outsider,

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> as a practical matter, is present in the state personally or by authorized representation, to further his business interests with local inhabitants through real and identifiable contracts representing a continuity of dealing and activity not too dissimilar from that indulged by local business people attending to their own business pursuits. (277 P.2d at p. 972).

Appellant submits that from the facts set forth hereinabove, it is clear that Respondent held itself out to be, and in fact was for over two years present in this State by authorized representatives who conducted its business; that Respondent's course of conduct and that of its local representatives was substantially similar in continuity and activity to the normal course of conduct generally pursued by every local architect; that the work being done was the result of specific and identifiable contracts for that work and requiring local representation; and that the present lawsuit arises directly out of these contracts and that work.

Finally, in *Conn v. Whitmore,* supra, Justice Crocket reviewed the line of United States Supreme Court cases commencing with *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945), which case established the rule that due process requires only that the non-resident corporation have certain *minimum* contacts within the state, such that invoking jurisdiction against it does not offend traditional notions of fair play and substantial justice. Justice Crockett concluded that in order to subject a corporation to the juris-

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diction of the courts of a foreign state the following test shall be applied:

> "There must be some substantial activity which correlates with a purpose to engage in a course of business or some continuity of activity in the state so that deeming the defendant to be present therein is founded upon a realistic basis and is not a mere fiction." (342 P.2d at p. 874).

Appellant submits that the substantial activities of Respondent over the two year period involved herein clearly justify this Court in sustaining the lower court's finding that Respondent's presence in Utah is founded upon a realistic basis and not upon a mere fiction.

Respondent, at pages 5 and 16 of its Brief, suggests the novel proposition that a foreign corporation should not be considered as doing business in this State if it performs such business in Utah at the request of the other party. Respondent cites no authority to support this proposition, and indeed no such authority exists. Clearly, the reason why Respondent was doing business in Utah is utterly immaterial to the instant question. At any rate, Respondent's statement that its resident architect was stationed in Utah at Appellant's request is false, for the record shows that the Architect's Agreement itself *required* Respondent to provide a resident architect in Salt Lake City during the construction period. (Ex. A, R. 78, para. 5(c)).

Respondent, at page 18 of its Brief, argues that "at the time of all services of summons in question

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in this case, Pereira's representative was no longer stationed in Salt Lake City, nor was there any necessity for his presence here." Thus, Respondent contends that service of process was invalid for the reason that Respondent had previously withdrawn from the State. The fact remains that Mr. Manning was in the State doing business for Respondent when he was served. Respondent's assertion that its representative was no longer needed in Salt Lake City simply is contrary to the facts. (See Point II (B), *infra*). In any event the question is moot since there is no merit in Respondent's legal contention. The United States Court of Appeals for the Tenth Circuit in *Houston Fearless Corporation v. Teter*, 318 F.2d 822 (10th Cir. 1963), recently rejected this argument, as follows:

> "In further support of its position that it was not 'doing business' in Colorado, appellant points out that its corporate officer, upon whom service was made, was only in the state for a single day and that, after the termination of the agreement with Teter, it did not maintain an office, employee or representative in the state. This is true but it is hardly controlling here. 'A foreign corporation which has ceased to do business in a state is still subject to service of process in suits on causes of action which arose out of business carried on by the defendant in the state.'" (318 F. 2d at 827).

The view expressed by the opinion cited is also expressed in the following cases and authorities:

In *1 Barron & Holtzoff, Federal Practice and Procedure*, Sec. 179, p. 697, footnote 98; *Electrical*

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Equipment Co. v. David Hamm Drayage Co., 217 F.2d 656 (C.A. 8th 1954).

See also *Westcott-Alexander Inc. vs. Dailey*, 264 F.2d 853, (C.A. 4th 1959) and *Ives v. Kinney Corporation*, 149 F. Supp. 710 (Ga. 1957) and 20 C.J.S., Corporations, Sec. 1920, p. 170, footnote 39, and the extensive cases cited thereunder and in the pocket supplement.

Respondent in Paragraph 3, page 18 of its Brief claims there is no support anywhere in the record for the lower court's finding in paragraph 2 of its Amended Judgment (R. 156) that "James S. Manning's departure from Salt Lake City, Utah on or about June 11, 1964 was motivated in part by a desire on the part of the corporate defendant architect not to be served in the prospective Prudential lawsuit." Respondent then cites Mr. Manning's affidavit as containing the reasons why Mr. Manning left the State on June 11, 1964. On this point, Appellant brings to the attention of this Court the fact that Respondent knew prior to June 11, 1964 it was going to be sued (Donovan affidavit, R. 97; Staten affidavit, R. 116), and Mr. Manning immediately after he was served with summons in his Hotel Utah room on June 25, 1964 told Mr. Kershisnik, "that they knew this was going to happen and that Continental Casualty Company had told them months ago to get out of the State of Utah and stay out." Also, "He further stated that they nevertheless felt an obligation to perform the services for Prudential in accordance with their contract and

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had informed Continental that they were going to do this regardless of the consequences, and that they had continued to maintain their offices in Salt Lake City until such time as the pressure had become so great that Manning had to leave." (Kershisnik affidavit, R. 108).

APPELLANTS REPLY TO RESPONDENT'S BRIEF

POINT II

SERVICE UPON JAMES S. MANNING WAS PROPER AND SHOULD BE UPHELD.

A. MR. MANNING WAS A REPRESENTATIVE OF RESPONDENT UPON WHOM SUMMONS WOULD PROPERLY BE SERVED.

At page 6 of its Brief, Respondent contends that Mr. Manning was not within the class of persons qualified to receive service under Utah Rule 4 (e) (4). The pertinent portion of this Rule provides that service upon a corporation shall be undertaken as follows:

> "If no such officer or agent can be found in the state, and the defendant has, or advertises or holds itself out as having, an office or place of business in this state, or does business in this state, then upon the person doing such business or in charge of such office or place of business."

The case of *W. L. Beard v. White, Green and Addison Associates, Inc.*, 8 U.2d 423, 336 P.2d 125 (1959) interpreted this rule as follows:

> "Under that rule the person served must be more than a mere employee. He must be in

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> charge of some of its property, operations, business activities, office, place of business *or in some manner be responsible for or have control over its affairs.*" (336 P.2d at p. 126, emphasis added).

See also the following cases, holding that service is proper where the person served is held out to be, or is an agent of the corporation in some degree responsible for or in control of its affairs: *Bristol v. Brent*, 38 Utah 58, 110 Pac. 356, 358-359 (1910); *Wein v. Crockett*, 113 Utah 301, 195 P.2d 222, 228 (1948); *Gibbons & Reed Co. v. Standard Accident Insurance Co.*, 191 F. Supp. 174, 176 (D. Utah 1960).

The record herein fully supports service upon Mr. Manning in accordance with the principles of the above cases. Respondent informed Appellant and designated Mr. Manning as the person in complete charge of the project, and as the person to whom anyone associated with the project was to turn for final answers as far as Respondent's activities were concerned. (Donovan affidavit, R. 97, para. 3; Kershisnik affidavit, R. 104, para. 1; Peterson affidavit, R. 137, para. 3). Respondent both on its letterhead stationery and in the classified pages of the Salt Lake City telephone directory designated and held out Mr. Manning as its "Resident Architect" in Salt Lake City. (Kershisnik affidavit, R. 104, para. 2) These facts are undisputed. Consequently, it is clear that Mr. Manning was represented as being, and in fact was an agent having requisite responsibility and control under the above Utah authorities.

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B. MR. MANNING WAS NOT ENTICED INTO UTAH FOR THE SOLE PURPOSE OF SERVING HIM WITH PROCESS.

Respondent has not attempted to analyze the numerous authorities set forth at pages 14-28 of Appellant's Opening Brief, nor does Respondent offer any contrary authority. Respondent relies solely upon cases involving settlement situations and consequently inapplicable to the situation under consideration as discussed at pages 28-32 of Appellant's Opening Brief.

Respondent has misstated the facts relating to the enticement issue in two material respects. First, at pages 7 and 22 of its Brief, Respondent states that by June 11, the construction period of the contract was over and Mr. Manning's supervision was no longer required. As pointed out in Appellant's Opening Brief, pages 8 and 23 - 26, there remained unperformed by Respondent numerous and vital items of work required to be performed by Respondent under its Agreement with Appellant. In addition to Appellant's discussion of this issue in its Opening Brief, the following facts of record fully discredit Respondent's conclusions and unsupported statements.

Mr. Manning himself admits that the project was not completed when he left Salt Lake City on June 11, 1964, since the following items remained to be accomplished by Respondent:

"A. Administrative details and verification of accounts.

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B. Verification of completion of punch-list items.

C. The issuance of the Architect's completion certificate."

(Manning affidavit, R. 149, para. 5)

The record also contains an elaborate description of the nature of these unperformed items of work. Mr. Charles Peterson, construction superintendent for the general contractor, Fullmer Brothers, stated that the following work remained to be performed by Respondent as of June 11, 1964:

1. Preparation of "punch-lists" to guide and correlate the final activities of the various trades, crafts and subcontractors working on the project, in order to allow completion of the building in a systematic fashion without delay.
2. Preparation of the final "punch-list."
3. Approval of subcontractors' and suppliers' bills and invoices.
4. Issuance of certain necessary change orders.
5. On-site supervision of numerous items of work requiring Respondent's action or decision, including problems with respect to the mechanical system, air conditioning, window washing equipment, window glass and floor coverings. (Peterson affidavit, R. 138-142; see also references to affidavits at page 8 of Appellant's Opening Brief).

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Clearly, in view of these facts, Appellant was justified in insisting that Mr. Manning return to Salt Lake City to complete Respondent's work before the grand opening of the building scheduled for June 29. Verification of final accounts and preparation of final punch lists could not have been prepared in the absence of an authorized supervisory representative of Respondent making an on-site inspection to determine if the work had been performed. As a matter of record, there were bills unpaid in excess of $300,000 for work performed prior to June 11 (R. 160, 162) to be investigated and approved by Respondent as required by its Agreement (R. 79, para. 5 (j)).

On pages 9 and 22 of its Brief, Respondent contends that on June 25, 1964, when Mr. Manning returned to Salt Lake City, there existed no critical situation requiring his presence. As pointed out in Appellant's Opening Brief, pages 23-26, the opposite was true. Appellant had scheduled its grand opening for June 29. As early as June 11, the work had proceeded to the point where Respondent's on-site supervision was essential in order to determine what work had been completed, what work had to be done, what work was defective and had to be remedied, what payments were due or were to become due, what claims should be allowed or rejected, and what back charges should be made against the contractor and subcontractors. These essential matters had to be resolved before Respondent could certify final payment and issue its completion certificate. These matters could only be resolved by a

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physical inspection of the work in Salt Lake City to determine what work had been done, how it had been done, by whom it had been done and whether it was fully completed. Apart from the contractual relations this was manifestly necessary so that the required certificates of occupancy from Salt Lake City authorities could be obtained in time for the scheduled grand opening on June 29. (Kershisnik affidavit, R. 105-106, para. 5; Staten affidavit, R. 113-114, para. 4; Peterson affidavit, R. 140-141, para. 9-10.)

That Mr. Manning's return to Salt Lake City on June 24 was for the purpose of accomplishing these necessary items of work is apparent from the record. On the morning of June 25, when Mr. Kershisnik entered Mr. Manning's hotel room, he observed a stack of correspondence approximately four inches thick pertaining to the job, consisting of invoices and correspondence dating back to the first part of June, which had not been processed. (Kershisnik affidavit, R. 108, para. 12).

POINT III

SERVICE UPON THE SECRETARY OF STATE WAS PROPER AND SHOULD BE UPHELD.

In its response to the extensive analysis and compelling authorities set forth by Appellant in its Opening Brief with respect to this point, Respondent relies solely upon highly technical and unconvincing arguments which cannot be determinative of this matter. First, on pages 28-29 of its Brief, Respondent relies upon cases relating to estoppel

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in its traditional sense as a defense based upon misrepresentation, reliance and injury. Obviously, the numerous cases cited by Appellant in its Brief do not use the term in such a restricted sense. Moreover, many of Appellant's cases base their decision upon the alternative ground that by reason of defendant's doing business in the State without complying with state qualification statutes, defendant has *impliedly consented* to service upon the Secretary of State of the State of Utah. (E.g., *Clay v. Kent Oil Co.*, 38 N.W.2d 258, 259-260 (S.D. 1949); *Wein v. Crockett*, 113 Utah 301, 195 P.2d 222, 231 (1948), discussed at pages 38-40 of Appellant's Opening Brief.) Respondent fails to discuss this alternative ground for sustaining such service.

On pages 32-33 of its Brief, Respondent contends that since the record shows that Respondent never qualified to do business in Utah, this Court cannot make a contrary presumption. Respondent's sole authority for this argument is the case of *Lubrano v. Imperial Council, O.U.F.*, 37 Atl. 345 (1897). First of all, Respondent overlooks the case of *Flinn v. Western Mut. Life Ass'n.*, 171 N.W. 711 (Iowa 1919), discussed at pages 35-36 of Appellant's Opening Brief, wherein the court stated that since state law required defendant corporation to qualify to do business and appoint the state auditor as its agent, "it will be *conclusively presumed* as against the corporation that it did comply with such requirements, and its rights will be determined on the theory of such compliance." (171 N.W. at p.

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713, emphasis added). Moreover, Respondent failed to quote the following language from the *Lubrano* case, *supra*, which immediately precedes the quoted portion set forth in Respondent's Brief:

> "It will thus be seen that *in those cases where the defendant appeared and pleaded to the jurisdiction*, by setting up the fact that it had not appointed some one authorized by it to accept service of process, as required by statute, *the courts uniformly held that this could not be allowed, the defendant being estopped from setting up its own misconduct.*" (37 Atl. at p. 247, emphasis added).

Thus, the court in *Lubrano* noted that the principle of estoppel is uniformly applied in cases such as that at bar where defendant actually appears and raises its failure to comply with state law in an attempt to avoid jurisdiction. In *Lubrano*, defendant never appeared in the action to contest jurisdiction.

On pages 34-35 of its Brief, Respondent quotes certain language from the Model Business Corporation Act Annotated to the effect that section 108 of the Act (from which Section 16-10-111 of the Utah Code was adopted) "leaves to other statutes *or to the common law* the question of service of process on foreign corporations which do not qualify to transact business in the State." (Vol. 2, p. 620, emphasis added). The principles of estoppel and implied consent are such common law principles, and have been applied in a majority of cases to statutes such as Section 16-10-111. Thus, the com-

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mentary in the Model Act so heavily relied upon by Respondent fully supports Appellant's position.

Finally, Respondent cites without discussion several cases noted in *18 Fletcher, Cyclopedia of Corporations*, Sec. 8742. Appellant has already pointed out, on pages 34-35 of its Opening Brief, that while contrary authority exists, the weight of authority supports Appellant's position. (23 *Am. Jur. Foreign Corporations* Sec. 499, p. 513). Moreover, *Fletcher* recognizes that a "difference of opinion" exists concerning this question, and cites scores of cases applying the principles of estoppel and implied consent before mentioning the few cases rejecting these principles. (*Fletcher, supra*, pp. 622-626). None of the five cases cited by Respondent are convincingly reasoned, and at least one such case, *Rothrock v. Dwelling-House Insurance Co.*, 37 N.E. 206 (Mass. 1894) is clearly distinguishable, since defendant in that case never appeared in the action and had no notice of the suit until judgment was rendered against it.

POINT IV

SERVICE UPON GEORGE W. MOONEY WAS PROPER AND SHOULD BE UPHELD.

A. MR. MOONEY WAS A REPRESENTATIVE OF RESPONDENT UPON WHOM SUMMONS COULD PROPERLY BE SERVED.

At pages 11 and 38-39 of its Brief, Respondent contends that Mr. Mooney was not a proper person upon whom service is permitted under Utah Rule 4 (e) (4). Appellant has discussed the requirements

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of this Rule hereinabove, in connection with Point II (A). With respect to the facts, the record discloses that Mr. Mooney was held out to Appellant to be, and purported to be the Construction Superintendent or Chief Superintendent of Respondent, and was so named in various progress reports prepared by Respondent during construction of Appellant's project. (Donovan affidavit, R. 100, para. 12). Respondent has never denied that such representations were made to Appellant, or denied that they were true. Moreover, Mr. Mooney was identified to Appellant as, and identified himself as being one of the superiors of James S. Manning, Respondent's resident representative in Salt Lake City. (Donovan affidavit, R. 100-101, para. 12). Again, Respondent does not deny these facts. Finally, Mr. Mooney frequently reviewed the progress of the Appellant's project, consulted with Mr. Manning and with Appellant's officers concerning performance of the work and of Respondent's obligations thereunder, and performed similar duties for Respondent in Provo, Utah in connection with a project for Brigham Young University. (Donovan affidavit, R. 101, para. 12).

Mr. Mooney himself admitted that at the time he was served with process, he was in Salt Lake City to discuss with Appellant's representatives and others, certain problems with respect to the air conditioning system in Appellant's building. (Mooney affidavit, R. 119, para. 6) Respondent's President,

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William L. Pereira, admitted that Mr. Mooney was an employee of Respondent and that Mr. Mooney assisted Appellant in connection with construction of its building during the construction period. (Pereira affidavit, R. 124, para. 12).

Thus, it is clear that Mr. Mooney was doing business in the State of Utah on behalf of Respondent, and was held out to be, purported to be, and was a person having sufficient responsibility and control for this Court to sustain service upon him under the authorities discussed hereinabove.

B. THE FILING OF A MOTION TO QUASH SERVICE OF SUMMONS DOES NOT IMPAIR THE RIGHT TO SERVE ADDITIONAL SUMMONS UPON DEFENDANT.

Respondent, at pages 39-42 of its Brief, argues that Appellant had no right to serve Mr. Mooney while a motion to quash service upon Mr. Manning was pending. Respondent relies solely upon the case of *Farris v. Walter*, stating that no contrary authority exists. Respondent does not discuss or even attempt to distinguish the case of *Lane v. Ball*, set forth at pages 43-45 of Appellant's Opening Brief. Moreover, Respondent's statements that the *Farris* case is "squarely in point", and "has been cited many times" are erroneous and misleading. Appellant has already discussed and distinguished the *Farris* case, at pages 46-47 of its Opening Brief. After a thorough examination of Shephard's Pacific Citator, Appellant has found not one case citing the

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Farris decision on the point at issue. Obviously, Respondent would have cited in its Brief any authority supporting *Farris* if such existed.

Respondent contends that to allow additional service of summons while a motion to quash the original summons is pending would require the court to perform "useless adjudications." In fact, the converse is true, as pointed out in Appellant's Opening Brief: Service of a second summons not containing the alleged defect of the first summons would render moot the pending motion to quash, and would justify its dismissal. Respondent misconceives the principle of mootness, for it raises a situation wherein the court would be "at work determining questions made moot by plaintiff's unilateral action" in serving additional summons. Clearly, since such questions are made moot by additional summons, they will not be determined by the court, but will be dismissed. (27 *C.J.S., Dismissal and Nonsuit*, Sec. 55, p. 401, and cases cited).

CONCLUSION

We submit to this Honorable Court that Respondent has failed to assert cogent and convincing authority or analysis in support of any of the questions at issue herein. On the basis of the authorities cited herein, and in Appellant's Opening Brief,

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we respectfully ask this Court to reinstate the service of process upon Respondent William L. Pereira & Associates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the ..... day of March ,1965, ... copies of the foregoing Answer and Reply Brief of Plaintiff and Appellant were served upon Shirley P. Jones, Jr., Attorney for Defendant and Respondent William L. Pereira & Associates, a corporation, 411 American Oil Building, Salt Lake City, Utah.

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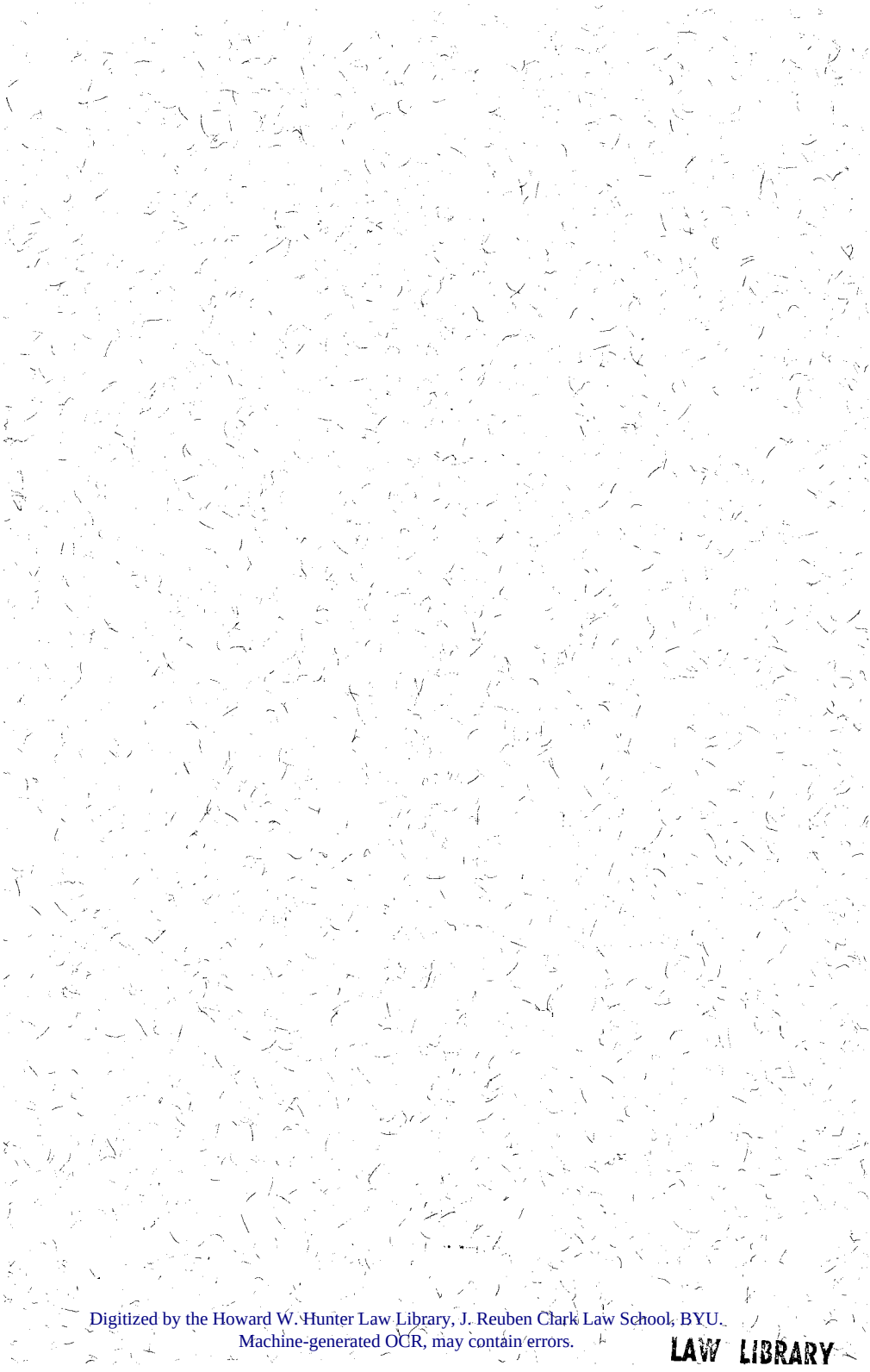

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